DOCKET NO. LND CV-21-6148307-S	:	SUPERIOR COURT
	:	
SELMA MIRIAM, ET AL.	:	JUDICIAL DISTRICT
	:	OF HARTFORD
V.	:	
	:	LAND USE LITIGATION DOCKET
SUMMIT SAUGATUCK LLC	:	MAY 31, 2022

MEMORANDUM OF DECISION

I

This matter comes to the court on cross motions for summary judgment on the issue of whether a common uniform development plan exists as to certain land in Westport.[1] Prior to this matter being commenced, extensive administrative and judicial land use proceedings[2] resulted in

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[1] The defendant, Summit Saugatuck LLC (Summit), originally briefed other arguments in its motion for summary judgment, but all counsel agreed in a stipulation filed on January 18, 2022, that the court would determine the threshold issue of whether a common uniform development plan exists before considering any other issues.

[2] In 2021, there were five pending cases before this court: an administrative appeal involving a sewer extension, *Summit Saugatuck, LLC* v. *Town of Westport Water Pollution Control Authority*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket No. LND CV-20-6143715-S; an administrative appeal of the Westport Planning and Zoning Commission's 2019 denial of applications for an affordable housing development, *Summit Saugatuck, LLC* v. *Westport Planning & Zoning Commission*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket No. LND CV-19-6120090-S; two wetland appeals regarding emergency access over a right of way on land in Norwalk to Summit's proposed development, *Summit Saugatuck, LLC* v. *Conservation Commission/ Inland Wetland Agency for the City of Norwalk*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket Nos. LND CV-20-6143605-S; LND CV-20-6143606-S; and a declaratory judgment action against Westport and the state Department of Housing (department) concerning a § 8-30g moratorium that the department granted to Westport in 2019. *Summit Saugatuck, LLC* v. *Connecticut Department of Housing*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket No. LND CV-20-6127403-S.

In 2021, Summit, the town and the Westport Planning and Zoning Commission agreed

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a settlement with the Westport Planning and Zoning Commission, among others, that gives approval to the defendant in the present case, Summit Saugatuck LLC (Summit), to develop a 157 unit multifamily housing complex, which qualifies as affordable housing under General Statutes § 8-30g. This court approved this settlement on July 19, 2021. Summit's affordable housing development would be located on certain property that it owns or has options to own on Hiawatha Lane or Hiawatha Lane Extension in Westport.[3]

The plaintiffs in the instant matter, Selma Miriam of 29 Hiawatha Lane Extension and Leslie Ogilvy of 27 Hiawatha Lane Extension in Westport,[4] did not intervene in these previous cases, but commenced this action seeking injunctive relief against Summit. In the plaintiffs' complaint, they allege that a common uniform development plan exists based upon a deed restriction which states: "Restriction that only a one-family house shall be erected on said

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on a reduced development plan and held public hearings on the proposed settlement agreement in May and June of 2021. Notice for the settlement proposal was published in the *Westport News* and the *Norwalk Hour*. Pursuant to General Statutes §§ 8-8 (n), 22a-43 (d) and Practice Book § 14-7B, this court held a hearing on July 19, 2021, for the proposed entry of final judgment and approved the stipulated judgments resolving the zoning and sewer appeals, approved the withdrawals of the two Norwalk wetland cases and confirmed withdrawal of the declaratory judgment action.

[3] Summit either owns or holds options to purchase ten lots on Hiawatha Lane or Hiawatha Lane Extension, which are located between Interstate 95 to the north and the Metro North Railroad to the south. As part of the original subdivision in 1954, these are lots 6 through 10, also known as 39, 41, 43, 45 and 47 Hiawatha Lane or Hiawatha Lane Extension, and lots 20 through 22, also known as 42, 44 and 38 Hiawatha Lane or Hiawatha Lane Extension, respectively. Summit also owns 28 and 36 Hiawatha Lane or Hiawatha Lane Extension, which are not part of the 1954 subdivision.

[4] The complaint was withdrawn as to one of the plaintiffs, Christopher Gazzelli of 37 Hiawatha Lane Extension in Westport, on March 25, 2022.

premises, the house or plans for which shall be approved by the grantors." See, e.g., Appendix, p. TR-10, attached to Summit's memorandum of law in support of its motion for summary judgment (Docket Entry # 111.00). Therefore, the plaintiffs assert that Summit is limited to developing the lots with single family homes only.

On November 10, 2021, Summit moved for summary judgment on the issue of whether there is a common uniform development plan, among other things. On January 18, 2022, the parties stipulated (Docket Entry # 118.00) that "[t]here are no issues of material facts with respect to the threshold issue [the 'so-called one-family-house restriction'] and that it can be adjudicated based on the facts presented in the November 2021 report prepared by Sound Title LLC along with related facts presented in the relevant pleadings." The parties further agreed in paragraph four of the stipulation that if the court did not find a uniform common plan, the plaintiffs would "have no other basis to challenge or prevent Summit from acting on the land use approvals" that were approved by the court on July 19, 2021.[5] Finally, as further noted in the

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[5] In Summit's memorandum of law in support of its motion for summary judgment, it also argued that the plaintiffs' claims constituted a collateral attack on the court approved, stipulated judgment and is thus barred; see, e.g., *In re Probate Appeal of Cadle Co.*, 152 Conn. App. 427, 434, 100 A.3d 30 (2014) ("[s]ummary judgment is the appropriate method for resolving a claim of res judicata" [internal quotation marks omitted]); and that the plaintiffs must prove that they have suffered or will suffer irreparable harm. The plaintiffs maintain that such a requirement is obviated as this action involves the enforcement of a restrictive covenant. See *Hartford Electric Light Co.* v. *Levitz*, 173 Conn. 15, 22, 376 A.2d 381 (1977) ("[a] restrictive covenant may be enforced by injunction without a showing that violation of the covenant will cause harm to the plaintiff, so long as such relief is not inequitable"). Such a statement raises the question of what is equitable in a case such as this–enforcement of a common uniform development plan requiring single family homes (assuming the existence of such a plan) or recognition and compliance with the legislative determination of the need of affordable housing? See, e.g., General Statutes

stipulation, the plaintiffs' December 28, 2021 opposition to Summit's motion for summary judgment can be considered as a cross motion for summary judgment. After several conferences, the court heard the motion limited as to the issue of the existence of the uniform common plan on February 9, 2022.

II

"The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book § 384 [now § 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Citations omitted; internal quotation marks omitted.) *Miles* v. *Foley*, 253 Conn. 381, 385-86, 752 A.2d 503 (2000).

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§§ 8-2; 8-2g; 8-19; 8-23 (d) (2); 8-23 (e) (1) (H); 8-30g; 8-30j; Public Acts 2021, No. 21-29. "The affordable housing land use appeals act was enacted to deal with the particular problem of the lack of affordable housing in Connecticut." *Wisniowski* v. *Planning Commission*, 37 Conn. App. 303, 314, 655 A.2d 1146, cert. denied, 233 Conn. 909, 658 A.2d 98 (1995). The same intent is also expressed in the department of housing statutes, General Statutes § 8-38 et al., and a myriad of funding statutes. Nevertheless, the court will only address the issue of the existence of a common uniform development plan at this time.

III

The issue is whether there is a genuine issue of material fact at to whether a common uniform development plan exists in the present case. Summit argues that the undisputed evidence demonstrates that no enforceable common plan existed or exists today. The plaintiffs assert that Summit's property is part of a common development plan subject to the restrictive covenant limiting the use of the property to one family houses only.

"Early Connecticut case law acknowledges the power of property holders with substantially uniform restrictive covenants obtained by deeds in a chain of title from a common grantor to enforce the restrictions against other owners with similar restrictive covenants. When, under a general development scheme, the owner of property divides it into building lots to be sold by deeds containing substantially uniform restrictions, any grantee may enforce the restrictions against any other grantee." (Internal quotation marks omitted.) *Abel* v. *Johnson*, 340 Conn. 240, 256-57, 263 A.3d 371 (2021).

"Restrictive covenants generally fall into one of three categories: (1) mutual covenants in deeds exchanged by adjoining landowners; (2) uniform covenants contained in deeds executed by the owner of property who is dividing [their] property into building lots under a general development scheme; and (3) covenants exacted by a grantor from [their] grantee presumptively or actually for the benefit and protection of [the grantor's] adjoining land [that they retain]." (Internal quotation marks omitted.) Id., 255-56. "With respect to the second category . . . [r]estrictive covenants should be enforced when they are reflective of a common plan of development. . . . The factors that help to establish the existence of an intent by a grantor to

develop a common plan are: (1) a common grantor sells or expresses an intent to put an entire tract on the market subject to the plan; (2) a map of the entire tract exists at the time of the sale of one of the parcels; (3) actual development according to the plan has occurred; and (4) substantial uniformity exists in the restrictions imposed in the deeds executed by the grantor. . . .

"The factors that help to negate the presence of a development scheme are: (1) the grantor retains unrestricted adjoining land; (2) there is no plot of the entire tract with notice on it of the restrictions; and (3) the common grantor did not impose similar restrictions on other lots." (Internal quotation marks omitted.) Id., 256.

IV

In the parties' stipulation, they agree that the material facts as to whether a common uniform plan exists are not contested and are "based on the facts presented in the November 2021 Report prepared by Sound Title LLC and attached to Summit's Summary Judgment [memorandum of law in support of its motion]." This report is attached to the affidavit of Andrew R. Sherriff, Jr., of Sound Title, LLC, who reviewed the creation and subsequent conveyances of the original twenty-two lot parcel in both Westport and Norwalk owned by E. Louise Bradley, as shown on a "Map of Property Prepared for the Estate of E. Louise Bradley, Gershom Bradley, Admr., Jeanette Hughes, Admx., Westport & Norwalk, Conn., Dec. 6, 1954, Scale 1"= 60', Certified Substantially Correct, Martin J. Capasse, Westport, Conn., Surveyor." Sherriff undisputedly concluded: "The estate of E. Louise Bradley aka Emma Bradley was the only entity that held title to all of the lots as shown on Map No. 3082. Of the original 22 lots, such Estate conveyed 7 lots subject to the Restriction, while the Restriction was not imposed by

the Estate of the remaining 15 lots. The Estate and 4 [subsequent] owners of the lots owned by the Estate, imposed the Restriction on a total of 12 of the 22 lots, while 10 of the lots shown on Map No. 3082 were not made subject to the Restriction."

"The common grantor is that owner of property who has divided it into building lots that are subject to a general development scheme as simultaneously expressed on the land records of the location of the property." *DaSilva* v. *Barone*, 83 Conn. App. 365, 371, 849 A.2d 902, cert. denied, 271 Conn. 908, 859 A.2d 560 (2004). There is no question of fact that E. Louise Bradley was not a common grantor and that she did not create a common plan. Map 3802 was prepared for her estate and, significantly, the map contained no restrictions. In fact, there were several sets of grantors of the lots of the original parcel and some lots were subject to the subject restriction and some were not. In 1955, according to Sherriff's report, E. Louise Bradley's estate, through the administrators Gershom B. Bradley and Jeanette Bradley Hughes, conveyed seven lots (lots 6, 8-10 and 20-22) in Westport subject to the single family house restriction, among other restrictions. In April of 1956, an undivided one half interest in the remaining lots (lots 1-5, 7, and 11-19) was transferred by a certificate of devise to Gershom Bradley and a like interest to William B. Bradley without the subject restriction. Thereafter in 1956, the estate of William Bradley and Gershom Bradley conveyed lots 1, 2, 5 and 7 subject to the restriction.[6] In 1959, lots 11 through 19 in Norwalk were transferred by Julia S. Bradley, Jeanette H. B. Hughes and

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[6] As previously noted, Summit owns or holds options to purchase lots 6-10 and 20-22. See footnote 3 of this memorandum of decision. As part of the 1955 and 1956 conveyances, these deed were all conveyed with the single family house restriction.

Conrad Ulmer to United Aircraft Corporation without the subject restriction or any restriction as to residential use.[7] In 1959, lot 3 was sold by the estates of Gershom Bradley and William Bradley without the subject restriction.[8] Lot 3 was later divided into two parcels as shown on map 5083, "Revised Map of Plot #3 Prepared for Fred Pascariello, Jr., Westport, Conn., Scale 1" = 60', Aug. 1960, Certified Substantially Correct, Martin J. Capasse, Land Surveyor," which was recorded in Westport's land records.[9] On October 13, 1960, the owners of the other the lots in Westport, i.e., lots 1-2, 4-10 and 20-22, entered into a property agreement with the owners of lot 3 allowing it to be divided into two lots with one single family home being constructed on each lot. This agreement was recorded in the Westport's land records at volume 191, pages 391 through 399.[10]

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[7] According to Sherriff's report, map 3802 was only filed in Westport even though portions of the original parcel are in Norwalk (lots 11-19 and portions of lots 10 and 20). Without a recording in Norwalk, there is no support for the establishment of a subdivision in that town. General Statutes, Revision of 1949, § 858 ("[a]ll plans for subdivision, shall upon approval, be filed or recorded in the office of the town clerk, and any plan, not so filed or recorded within ninety days following its approval by the commission . . . shall become null and void").

[8] The deed may be found on page TR-52 of docket entry # 111.00.

[9] The map is attached to the plaintiffs' memorandum in law in opposition to the motion for summary judgment, docket entry # 115.00, exhibit 4.

[10] Attached to the plaintiffs' memorandum of law as exhibit, the agreement, in relevant part, states: "It is the purpose and intent of this deed to waive, release and relinquish any and all rights or claims which the releasors have, or might have, to object to said Lot No. 3 being subdivided into two building lots or to object to two one-family dwelling houses being built thereon, one on each of said two building lots. The rights or claims hereby waived, released and relinquished include those arising from or by virtue of the restrictions or restrictive covenants to which the premises shown on said map No. 3802 are or may be subject, or arising from or by virtue of any other cause or reason.

In 1962, the estates of Gershom Bradley and William Bradley conveyed lot 4 without the restriction. Lot 4 was subdivided thereafter into three parcels with single family houses. The subdivision of lot 4 is reflected on map 6915 entitled, "Map of Property For Horelick Bros. Westport, Conn. Scale 1"=60' Apr. 18, 1969 by John T. Cahill, Land Surveyor Westport, Conn.," approved by the Town Plan and Zoning Commission on September 14, 1971, and filed in the town clerk's office on November 8, 1971.[11]

Miriam's house at 29 Hiawatha Lane Extension is part of lot 2 and Ogilvy's house at 27 Hiawatha Lane Extension is lot 1. As previously noted, the Ogilvy lot and lot 5 were conveyed by a certificate of devise in 1956 without any restriction. Their next conveyance included the restriction, but that was placed by other grantors.

In terms of the *Abel* factors, this evidence demonstrates that there is no genuine issue of material fact that most of the factors are not present to show a grantor's intent to develop a common plan. See *Abel* v. *Johnson*, supra, 340 Conn. 256 ("the existence of an intent by a grantor to develop a common plan are: (1) a common grantor sells or expresses an intent to put

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"This deed is executed and delivered, to permit the present or future owners of said Lot No. 3 to subdivide said lot into two lots of at least 0.377 acre each, and to build on each of said two lots a one-family house and no other purpose is intended by the execution and delivery of this deed."

The division of lot 3 is reflected on map 5083 entitled, "Revised map of plot 3 Prepared For Fred Pascariello, Jr. Westport, Conn. Scale 1"=60' Aug. 1960," approved by the Planning and Zoning Commission on October 10, 1960, and filed in the town clerk's office on October 17, 1960.

[11] The map is attached to the plaintiffs' memorandum in law in opposition to the motion for summary judgment, docket entry # 115.00, exhibit 5.

an entire tract on the market subject to the plan; (2) a map of the entire tract exists at the time of the sale of one of the parcels; (3) actual development according to the plan has occurred; and (4) substantial uniformity exists in the restrictions imposed in the deeds executed by the grantor" [internal quotation marks omitted]). It is true that the lots in the area have single family homes constructed on them–as do most of the subdivisions in Connecticut–but that circumstance does not by itself demonstrate an intent to create a common plan as defined in our case law. In the present case, there is no common grantor or evidence of a grantor's intent to convey all of the lots subject to the plan. Indeed, the original twenty-two lots were not all conveyed by the original grantor, E. Louise Bradley's estate, nor were they all conveyed subject to any recorded declaration of restrictions applicable to all lots.[12] This is underscored by the undisputed fact that the nine lots in Norwalk were conveyed without the restriction.[13] There is also no evidence that any grantor or grantors actually approved any house plans or that the power to approve any plans was afforded to anyone.

Additionally, there is no map of the entire tract with notice of the restriction upon it. While Gershom Bradley was involved in certain transfers–whether he acted as an administrator

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[12] None of the deeds contained any language such as "subject to," "which runs with the land," or "shall be binding on successors and assigns." See *Abel* v. *Johnson*, supra, 340 Conn. 260.

[13] This court notes that a portion of the Norwalk land contained inland wetlands which in 2009 became part of a conservation easement that was part of the Norwalk wetland appeals resolved by settlement in 2021. See footnote 2 of this memorandum of decision. The regulatory program established in the Inland Wetlands and Watercourses Act was not promulgated until 1972.

for E. Louise Bradley, in his individual capacity, or through his estate–the administrators of E. Louise Bradley's estate only imposed the restriction on seven lots (lots 6, 8, 9, 10, 20, 21 and 22) out of the original twenty-two lots. The next four lots (lots 1, 2, 5 and 7) with the restriction were conveyed by different grantors, one of which was William Bradley's estate, and, at least from this stipulated record, it is noted that William Bradley was never an administrator of E. Louise Bradley's estate. Thus, of the original twenty-two lots, only eleven had the initial single family restriction and this does not effectuate a general plan by the grantor. See *Whitton* v. *Clark*,

112 Conn. 28, 37, 151 A. 305 (1930) (holding that tract where only twenty of fifty-four lots subject to restriction fell "far short of the putting into effect by the grantor of any general plan or scheme with reference to the lots in the tract").

Additionally, these undisputed facts demonstrate that all three of the negating factors are present. See *Abel* v. *Johnson*, supra, 340 Conn. 256 ("(1) the grantor retains unrestricted adjoining land; (2) there is no plot of the entire tract with notice on it of the restrictions; and (3) the common grantor did not impose similar restrictions on other lots" [internal quotation marks omitted]). First, several of the lots, including the lots in Norwalk, were retained as unrestricted adjoining land. Second, there is no map of the entire tract with the restriction on it. Third, there were no single home restrictions placed on eleven of the twenty-two lots. Specifically, the conveyances of lots 3, 4 and 11-19 contained no restriction.

The court is mindful that "uniformity is especially important to a finding that a common plan of development exists." *Contegni* v. *Payne*, 18 Conn. App. 47, 57, 557 A.2d 122, cert.

denied, 211 Conn. 806, 559 A.2d 1140 (1989). Nevertheless, given the lack of a common grantor, the conveyance of half of the lots without restriction and no map of the tract with the restriction, the undisputed facts demonstrate no question of fact that a uniform common plan does not exist in this case

Accordingly, Summit's motion for summary judgment is granted and the plaintiffs' cross motion for summary judgment is denied. Consistent with paragraph four of the parties' stipulation, judgment is entered in favor of Summit.

Berger

Berger, J.T.R.